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No. 94-1002

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In the Supreme Court of the United States

OCTOBER TERM, 1994

NEERAN ZAIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entrapped as a matter of law as a result of the undercover investigation that led to her prosecution for bribery, visa fraud, and alien smuggling.

2. Whether petitioner was a victim of outrageous government conduct requiring dismissal of the indictment under the Due Process Clause of the Fifth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is unpublished, but the judgment is noted at 35 F.3d 567 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1994. The petition for a writ of certiorari was filed on December 5, 1994, and is therefore out of time under Rules 13.1 and 13.4 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on seven counts of visa fraud, in violation of 18 U.S.C. 1546(a) (Counts 6-12); three counts of bribery, in violation of 18 U.S.C. 201(b)(1) (Counts 17-19); and one count of alien smuggling, in violation of 8 U.S.C. 1324(a)(1)(D) (Count 20).[1] She was sentenced to concurrent prison terms of 15 months, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. 1a-36a.

1. In the wake of the Persian Gulf War, petitioner, who operated a travel agency in Detroit, advertised on an Arabic-language television station that she could assist Catholic Iraqis (Chaldeans) who had fled to Jordan emigrate to another country. Gov't C.A. Br. 3-4. Sixteen Chaldeans or their Detroit-area relatives hired petitioner for that purpose in late 1991. Pet. App. 3a; Gov't C.A. Br. 5. Promising to obtain visas for Mexico or Canada, petitioner charged fees ranging from $2,000 to $5,000 per person, exclusive of travel and lodging expenses. Pet. App. 3a; Gov't C.A. Br. 5, 22-23. Instead of securing the promised visas, however, petitioner gave the Chaldeans "passports" issued by the "World Service Authority" (WSA), a private group that espouses world citizenship, and tourist visas for the Dominican Republic, where the group stayed for about two months. Pet. App. 3a-4a; Gov't C.A. Br. 5-6, 22.

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[1] Petitioner was acquitted on five other counts of visa fraud (Counts 1-5) and four other counts of bribery (Counts 13-16). 1 C.A. Joint App. 53. A count charging conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371 (Count 21), was dismissed on motion of the government. 1 C.A. Joint App. 53.

While in the Dominican Republic, petitioner tried to obtain United States visas at the United States Embassy by claiming that the group planned to travel through the United States in order to vacation in Acapulco, Mexico. An Embassy official denied the visas, explaining that the United States does not recognize WSA passports as valid. Pet. App. 4a; Gov't C.A. Br. 6.

After unsuccessful attempts to have Nicaragua and Guatemala accept the group, petitioner arranged for the Chaldeans to fly to Belize (formerly British Honduras), where they stayed at a hotel run by an American citizen, Sue Williams. Petitioner told Williams that the group was touring Belize and that she was their guide. Petitioner then asked Williams if she knew anyone at the United States Embassy who could help them get visas to the United States. Petitioner added that she would be bringing "lots of people through" and that if Williams acquired the proper contact, they "both could make lots of money." Suspicious, Williams reported this conversation to Rudolph Boone, the United States Consul at the American Embassy in Belize City. Boone was already aware of the Iraqis' presence, having received a State Department cable to the effect that petitioner had tried to bribe a Guatemalan official to furnish visas for her group. Boone relayed Williams' information to the State Department. Pet. App. 4a-5a, 13a-15a & n.4; Gov't C.A. Br. 6-7, 13-14, 17, 22-23.

On instructions from the State Department, Boone arranged a meeting with petitioner on February 5, 1992, at a restaurant owned by Williams. Pet. App. 5a. Boone surreptitiously taped that and subsequent meetings with petitioner. *Ibid*; Gov't C.A. Br. 8. Identifying himself as "the counsel, the chief of the section," Boone told petitioner that he had heard she was with a group and

that "you might need some help and I was wondering what that was." Pet. App. 51a. Petitioner replied that her group was Iraqi and had trouble getting visas. *Id.* at 51a-53a. Boone said, "if I can help you, let me know[.]" *Id.* at 57a. Petitioner confirmed that she could use his help and asked "what kind" he could give her. *Ibid.* When Boone answered, "[w]ell, you tell me," petitioner said that "every month" she had a "different group" seeking to go to Canada, Mexico, or the United States. *Id.* at 57a-58a. Boone hesitated ("Well, I don't know about that"), *id.* at 58a, but petitioner pressed him ("So what are you going to do for them?"), *id.* at 59a. Boone asked, "[w]hat's in it for me?," and petitioner countered, "I don't know what are you going to do for me." *Id.* at 60a. When Boone agreed to obtain visas, petitioner thanked him, adding, "This is business. We're going to make money, you know." *Ibid.*

Boone again hesitated about getting visas for petitioner on a monthly basis, Pet. App. 63a, but petitioner pointed out that, right then, she had "just a few [people] left," and she urged him to "do something just between us," *id.* at 64a. Petitioner added, "if you like to work with me, we're going to work together." *Ibid.* She then asked for Belize passports and agreed not to call Boone at home. *Id.* at 66a-67a. When Boone asked her, "How much is this worth to you?," petitioner replied, "I don't know what you gonna do[.]" *Id.* at 68a. Boone promised to obtain visas for the United States, and petitioner asked "[h]ow long" it would take. *Id.* at 68a-69a. After discussions about price, volume, and timing, petitioner instructed Boone: "Okay, go ahead, start." *Id.* at 72a. Boone agreed to issue two visas that day and the rest later. *Id.* at 73a, 79a. The meeting ended after

petitioner had Boone promise to meet her again at a particular time and place. *Id.* at 80a-81a.

Over the next six days, petitioner met with Boone five more times. Gov't C.A. Br. 9. At each meeting, petitioner gave Boone Iraqi passports, and he returned them stamped with non-immigrant United States visas in exchange for cash. *Id.* at 9, 13. All told, petitioner paid Boone $3,750 for 12 visas. Pet. App. 3a, 6a-7a; Gov't C.A. Br. 9, 18.[2] During their meeting on February 10th, petitioner asked Boone for his address and telephone number and told him, "I don't want it to be too hard to call you." 2 C.A. Joint App. 524. At their February 11th meeting, petitioner invited Boone to visit her home and office in Detroit. *Id.* at 552. She also gave him her home telephone number and said that he should call her collect. *Id.* at 557.

The 12 aliens for whom petitioner had secured fraudulent visas traveled to the United States in two groups: One group entered the country through New Orleans with petitioner, while the other group entered through Houston. When a Customs inspector in New Orleans questioned petitioner about the visas, she denied knowing anything about them. She claimed that the group was planning to attend Mardi Gras, then return to Jordan or Belize. In fact, the group did not attend Mardi Gras, but went to Detroit. Pet. App. 7a; Gov't C.A. Br. 10.

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[2] The two visas that Boone issued to petitioner on February 5th were the subject of Counts 1 and 2 of the indictment; he issued three visas to her on February 7th, which were the subject of Counts 3, 4, and 5. Those five visa fraud counts were the ones on which she was acquitted. She was also acquitted on the briberies charged on February 5th (Count 13), February 6th (Counts 14 and 15), and February 10th (Count 16). See Pet. App. 6a.

At petitioner's direction, the four aliens for whom she was unable to obtain visas traveled from Belize to Mexico, where they swam across the Rio Grande River at night to Brownsville, Texas. There, they met up with petitioner's co-defendant, Hazim Saeegh, who had been waiting for them. Pet. App. 3a, 7a; Gov't C.A. Br. 10-11, 14, 23.

On February 20, 1992, Boone met petitioner in her Detroit office, in accordance with her previous invitation. The two and Saeegh discussed an expanded role for Boone in their visa business, *i.e.*, if Boone processed about 30 Iraqis per month as well as some Chinese immigrants, they would pay him $500 for each fraudulent immigrant visa and $1,000-$2,000 for each passport. In addition, with petitioner present, Saeegh asked for Boone's help in transferring to Belize an immigration petition that was pending in Algeria. Boone agreed to handle the matter for $500. The next day, in Boone's hotel room, Saeegh gave Boone the file on that case, and petitioner handed Boone $500 in cash. Pet. App. 7a-8a, 18a; Gov't C.A. Br. 11, 13-14, 18.

2. Petitioner asserted an entrapment defense at trial and moved for a judgment of acquittal on the ground that she had been entrapped as a matter of law. Pet. App. 9a. The district court denied the motion and submitted the entrapment issue to the jury. *Ibid.* Without objection, the court gave the Sixth Circuit's pattern instruction on entrapment. *Id.* at 18a. See also Pet. C.A. Br. 44 (conceding that defense counsel had "agreed to the instruction given"). The jury found petitioner guilty as indicated above.

Following the verdict, petitioner moved to dismiss the indictment, on the ground that the manner in which the government had investigated her was so outrageous as to

violate due process. 1 C.A. Joint App. 35, 47-50. The district court assumed that a defense of outrageous government misconduct exists under the Due Process Clause, but it rejected petitioner's claim, explaining that it did not believe that the government's conduct in this case was in fact "outrageous." 2 C.A. Joint App. 399.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court rejected petitioner's claim that she had been entrapped as a matter of law. Relying on *Jacobson* v. *United States*, 112 S. Ct. 1535, 1541 (1992), for the proposition that a defendant's "ready commission of [a] criminal act" demonstrates predisposition, Pet. App. 12a, the court found that, viewed in the light most favorable to the government, the evidence "justifie[d] the inference that [petitioner] was * * * predisposed to commit the crimes for which she was convicted[,]" *id.* at 14a-15a.

The court also rejected petitioner's claim that she was the victim of outrageous government conduct. The court reasoned that petitioner

> was the one who first approached Williams about making contact with an employee of the United States embassy in Belize * * *, and that [petitioner] on her own, without any government participation or knowledge, sent four of her clients into Mexico illegally, without, [*sic*] visas of any kind * * *. It was also [petitioner] who selected which passports to give to Boone * * *; and it was [petitioner] who created the need for her illegal activities by bringing her clients to Belize without any realistic chance of obtaining legitimate visas for them.

Pet. App. 22a-23a. The court also acknowledged the government's argument that, in order to investigate petitioner's apparent interest in obtaining fraudulent visas, "it had no choice but to present someone to be

bribed, namely Boone[.]" Accordingly, the court concluded that petitioner had "show[n] enough initiative in the conduct of the criminal activities at issue here to prevent our finding that the government['s] conduct in this case was so outrageous as to shock the universal sense of justice." *Id.* at 23a (internal quotation marks omitted).

ARGUMENT

1. Petitioner renews her contention that she was entrapped as a matter of law. Pet. 31-52. That claim does not merit review.

a. A valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct. *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). "Predisposition, the principal element in the defense of entrapment, * * * focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime." *Ibid.* (citations and internal quotation marks omitted). Petitioner claims that she had only a "generalized desire" to protect refugees, and that, "but for the creative intervention of Consul Rudolph Boone," she would not have committed any crimes. Pet. 49-50.

As petitioner recognizes (Pet. 32 n.4), in evaluating a claim of entrapment as a matter of law, the evidence of predisposition must be viewed in the light most favorable to the government. See, *e.g.*, *United States* v. *Martinez*, 979 F.2d 1424, 1430 (10th Cir. 1992), cert. denied, 113 S. Ct. 1824 and 113 S. Ct. 3019 (1993); *United States* v. *Ford*, 918 F.2d 1343, 1348 (8th Cir. 1990); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987). Viewed in that light, the evidence

does not support petitioner's claim that she committed the crimes at issue because of "irresistible inducement," Pet. 41, 50, by "an overly zealous" Boone, *id.* at 48.

Boone contacted petitioner only after she had promised Sue Williams a chance to make "lots of money" if Williams put her in touch with anyone in the United States Embassy who could supply her with visas. When petitioner and Boone met, she "showed no reluctance whatsoever to break the law," and she "very quickly warmed to the idea" of bribing him for fraudulent visas. Pet. App. 13a-14a. Indeed, at their first meeting, the discussion focused less on whether petitioner would pay a bribe than on how large the bribe would be, how many visas Boone could obtain, and how quickly. When Boone at first provided only two visas, petitioner sought additional meetings with him in order to obtain visas for the rest of her group, and met with him five more times in Belize for that purpose. Over the course of a week, petitioner paid Boone a total of $3,750 in bribes in exchange for 12 fraudulent visas. See Pet. App. 3a, 6a-7a; Gov't C.A. Br. 9, 18.[3]

Petitioner's intent to promote her illegal immigration business on a continuing basis, with or without Boone's help, also showed her predisposition. At their first meeting, petitioner informed Boone that she would be back for more visas every month. Pet. App. 57a-58a. When Boone expressed doubt that he could accommodate her, *id.* at 58a, petitioner encouraged him by saying:

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[3] That petitioner was acquitted on several counts of visa fraud and bribery did not, of course, preclude consideration of the conduct underlying those counts as evidence of predisposition. Cf. *United States* v. *Powell*, 469 U.S. 57, 65 (1984) (jury may have acquitted out of "mistake, compromise, or lenity," even though "convinced of guilt").

"This is business. We're going to make money, you know," *id.* at 60a. Later, petitioner arranged—without the involvement of Boone or any other government agent—for four of her "clients" to enter the United States illegally through Mexico. She also renewed contact with Boone in Detroit, where she paid him $500 to act on an immigration petition and offered him substantial money to process a steady stream of illegal immigrants. Gov't C.A. Br. 10-11. That evidence was sufficient to support the jury's conclusion that petitioner was amply predisposed to engage in an illegal immigration scheme.

b. Petitioner also argues (Pet. 31, 41-42, 50) that the court of appeals misapplied *Jacobson* by overlooking its requirement that the defendant's disposition to commit the criminal act be shown beyond a reasonable doubt to have existed before and independently of the government's contacts with her, 112 S. Ct. at 1540 n.2, 1543. While concluding that the defendant in that case was not predisposed to commit the offense in question before government agents persistently pressured him to break the law, the *Jacobson* Court reaffirmed the longstanding principle that a prosecution will not be defeated when government agents "merely afford opportunities or facilities for the commission of the offense," and that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." 112 S. Ct. at 1540. The Court explained:

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply

> provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition.

112 S. Ct. at 1541. The court of appeals expressly relied on that portion of the *Jacobson* decision, see Pet. App. 10a-11a, and correctly applied it to the instant case, see *id.* at 13a-16a.

As the court of appeals observed, the evidence showed that, "regardless of who first suggested that the visas could be obtained for money," Pet. App. 13a, petitioner readily and willingly availed herself of the opportunity to bribe Boone. That action, coupled with her prior efforts to locate an embassy official to bribe, confirmed that petitioner was not "an otherwise law-abiding citizen who, if left to h[er] own devices, likely would have never run afoul of the law[.]" *Jacobson*, 112 S. Ct. at 1543.[4]

Contrary to petitioner's contention (Pet. 32-33), the conclusion reached by the court of appeals in this case does not conflict with *United States* v. *Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc). In *Hollingsworth* the majority stated that *Jacobson* had changed the law of entrapment, because the government must now prove that the defendant was "ready and willing" to commit the crime not only in the traditional sense of having been

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[4] We note that petitioner does not challenge the district court's entrapment instruction in this Court. That instruction repeatedly cautioned that a guilty verdict may not be returned if "the government persuaded a defendant who was not already willing to commit a crime to go ahead and commit it." The Sixth Circuit correctly regards that language as "consistent with *Jacobson*," *United States* v. *Sherrod*, 33 F.3d 723, 725-726 (1994), petition for cert. pending, No. 94-7209, and petitioner does not argue otherwise.

amenable to doing so, but also in the sense of having been "so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so." *Id.* at 1200. The court of appeals in this case stated that its precedents were "more in line" with Judge Ripple's panel dissent in *Hollingsworth*, which the five dissenting judges endorsed when the case was reheard en banc. Pet. App. 12a (citing *United States* v. *Hollingsworth*, 9 F.3d 593, 603-604 (7th Cir. 1993) (Ripple, J., dissenting)). That statement, however, does not indicate a conflict that warrants resolution in this case, because petitioner's conviction would be affirmed even under the analysis of the *Hollingsworth* majority.

Petitioner's conduct made her, under *Hollingsworth*, the sort of "traditional [sting] target" for whom "all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability [to violate the law] can be presumed." See 27 F.3d at 1200. Petitioner was the moving force in seeking to obtain visas through a fraudulent scheme, as demonstrated by her prior attempt to bribe the Guatemalan authorities, her offer of "lots of money" to Williams in exchange for an embassy contact, her promise to Boone that the scam would be a continuing money-making operation, and her subsequent smuggling of four illegal aliens into the United States through Mexico without any help from Boone or any other involvement by the government.[5]

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[5] Petitioner faults the court of appeals for mentioning her attempted bribery of a Guatemalan official, claiming that the government improperly elicited testimony about it from Boone "on redirect examination." Pet. 42 n.15. In fact, Boone referred to it

Petitioner clearly was "in a position without the government's help to become involved in illegal activity" of the very type of which she was convicted. *United States* v. *Hollingsworth*, 27 F.3d at 1200.

Nor is this case "strikingly similar" (Pet. 39) to *United States* v. *Sandoval*, 20 F.3d 134 (5th Cir. 1994). The defendant in *Sandoval* initially explored lawful means to resolve his tax liability, and reluctantly agreed to pay a bribe only after a government agent, playing upon the defendant's financial weakness, "doggedly steered [him] away from a legitimate reward for information," *id.* at 138, and toward a benefit for herself. Here, by contrast, the agent, Boone, did not approach petitioner until she had already tried to involve Williams in her illegal immigration scheme. Petitioner then "showed no reluctance whatsoever to break the law," Pet. App. 13a, when offered the opportunity. She also continued to break the law both with and without Boone. Those facts bear scant resemblance to *Sandoval*.

2. Petitioner also claims (Pet. 52-55) that the indictment should have been dismissed under the Due Process Clause of the Fifth Amendment, because Boone engaged in outrageous misconduct.[6]

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on cross-examination, in response to defense counsel's criticism of him for not telling petitioner directly of his concerns about her group's presence in Belize. 12/7/92 Tr. 170. After eliciting that testimony, defense counsel moved for a mistrial. The district court correctly denied that motion, noting that Boone had not "blurted out [something] that had no relationship to anything asked of him." *Id.* at 177.

[6] A claim of outrageous government misconduct raises a purely legal defect in the institution of the prosecution, which is waived unless raised prior to trial under Fed. R. Crim. P. 12(b)(1) and (b)(2). See, *e.g.*, *United States* v. *Henderson-Durand*, 985 F.2d 970, 973 & n.5 (8th Cir.), cert. denied, 114 S. Ct. 164 (1993); *United*

This Court has never held that the government's mere use of undercover agents, or the use of deception by them, gives rise to a due process defense, although in *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), it left open the possibility that conduct of law enforcement officials may be "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." The courts of appeals have expressed different views on whether any outrageous government conduct defense exists, compare *United States* v. *Tucker*, 28 F.3d 1420, 1428 (6th Cir. 1994) (no defense exists as to predisposed defendant), petition for cert. pending, No. 94-6963, with *United States* v. *Kelly*, 707 F.2d 1460, 1461, 1476 (D.C. Cir.) (opinion of R.B. Ginsburg, J., for the court) (suggesting that coercion, violence, or brutality is required), cert. denied, 464 U.S. 908 (1983); *United States* v. *Myers*, 692 F.2d 823, 836-843 (2d Cir. 1982) (same), cert. denied, 461 U.S. 961 (1983), but no court of appeals has held that a predisposed defendant may establish a violation of due process merely because she purportedly was induced to commit the crime by an undercover agent. Indeed, while the court of appeals noted that it does not recognize a due process defense, Pet. App. 23a-24a n.6 (citing *Tucker*, *supra*), it concluded that in any event petitioner "showed enough initiative in the conduct of the criminal activities at issue here to prevent [a] finding that the government conduct * * * was so outrageous as to 'shock the universal sense of justice.'" Pet. App. 23a. The district court expressed the same view. 2 C.A. Joint App. 399.

States v. *Duncan*, 896 F.2d 271, 274 (7th Cir. 1990); *United States* v. *Nunez-Rios*, 622 F.2d 1093, 1099 (2d Cir. 1980). Because petitioner first made her claim of "outrageousness" in a post-verdict motion, she waived that claim.

None of the court of appeals decisions on which petitioner relies (Pet. 53-54) assist her due process claim. In *United States* v. *Twigg*, 588 F.2d 373 (1978), a divided panel of the Third Circuit reversed convictions where government agents had supplied the defendants—who had previously been "lawfully and peacefully minding [their] own affairs," *id.* at 381; see also *id.* at 382—with the chemicals, laboratory, and expertise necessary for them to manufacture methamphetamine. As the Third Circuit recently noted, however, it has never applied *Twigg* since that case was decided, see *United States* v. *DeRewal*, 10 F.3d 100, 105 n.3 (1993), cert. denied, 114 S. Ct. 1544 (1994), and that court also has suggested that *Twigg* was wrongly decided. See *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983). Moreover, even were *Twigg* still authoritative, it is distinguishable. Unlike the government agents in *Twigg*, Boone merely presented petitioner with an opportunity to do what she intended to do both before and after meeting him: get Chaldeans into the United States by any means necessary, legal or illegal.

Nor is petitioner aided by *United States* v. *Solorio*, 37 F.3d 454 (9th Cir. 1994). That case turned on the panel's perception (which we have disputed in a rehearing petition that remains pending) that a drug informant "was paid a fee contingent on conviction." 37 F.3d at 458; see also *id.* at 459, 460 (reemphasizing that payments were contingent on "getting people convicted"). The panel deemed such a contingency fee outrageous because it provides "too great an incentive for informants to fabricate evidence and to maximize the amount of drugs

involved." *Id.* at 458. Plainly, *Solorio* is factually inapposite to the instant case.[7]

Finally, petitioner relies on *United States* v. *Harris*, 997 F.2d 812 (1993), which she characterizes as "an entrapment case" in which the Tenth Circuit "stated in dicta that an alternative ground for reversing the conviction was that the government's conduct approached being sufficiently outrageous to sustain a due process defense." Pet. 54 n.19. In *Harris*, the district court had dismissed two drug counts on grounds of outrageous government conduct. On the government's appeal, the Tenth Circuit "concluded [that] the government did not create the crimes for which Defendant is charged" and that the undercover agent's payment of the defendant in cocaine for his role as a middleman in the drug transaction was not "so coercive that [his] due process rights were impinged." 997 F.2d at 818. The court found the record unclear, however, on the question whether the agent knew that the defendant was an addict and nevertheless "reli[ed] on that addiction to conduct multiple transactions" lacking "a specific investigatory purpose." *Id.* at 818-819. The court remanded for a determination of that factual issue. *Id.* at 819. Petitioner is not akin to the addict in *Harris*.

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[7] Petitioner also cites (Pet. 54) the Ninth Circuit's decision in *Greene* v. *United States*, 454 F.2d 783 (1971), where the court found that, over at least a 2 1/2-year period, the government had created and maintained bootlegging operations, for which it served as the only customer. That conduct cannot be compared to the discrete episode in this case. In addition, *Greene* was one of the authorities necessarily rejected by this Court's ruling in *Hampton* v. *United States*, 425 U.S. 484 (1976). See *id.* at 498 (Brennan, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1995